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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10
11 Plaintiff,

12 v.

13 Samuel Cervantez-Hernandez,

14 Defendant.
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No. CR-17-01414-TUC-RM (BGM)

REPORT AND RECOMMENDATION

16 Currently pending before the Court is Defendant Samuel Cervantez-Hernandez's
17 Motion to Dismiss (Doc. 23). The Government has filed its response, as well as a
18 Supplemental Response. Govt.'s Response to Def.'s Mot. to Dismiss (Doc. 42); Govt.'s
19 Suppl. Response (Doc. 60). Defendant is charged with one (1) count of conspiracy to
20 possess with intent to distribute marijuana and one (1) count of possession of marijuana
21 with intent to distribute. Indictment (Doc. 18) at 1–2. Defendant Samuel Cervantez-
22 Hernandez seeks dismissal of the Indictment, because his primary language is Cora and
23 he speaks insufficient Spanish to adequately communicate with counsel. *See* Def.'s Mot.
24 to Dismiss (Doc. 23).

25 Pursuant to LRCrim. 5.1, this matter came before Magistrate Judge Macdonald for
26 an evidentiary hearing and a report and recommendation. On January 26, 2018, an
27 evidentiary hearing was held before Magistrate Judge Macdonald regarding the motion.
28 Minute Entry 1/26/2018 (Doc. 62). This matter is ripe for adjudication. The Magistrate

1 Judge recommends that the District Court, after its independent review, grant
2 Defendant's motion.

3 4 **I. FACTUAL BACKGROUND**

5 ***A. The Incident Resulting in Arrest***

6 On August 14, 2017, an air asset advised agents that he saw four (4) individuals
7 that were suspected of smuggling marijuana walking in the desert near Big Fields,
8 Arizona. Compl. (Doc. 1) at 1; *see also* Case No. 17-00185MJ Compl. (Doc. 1). Agents
9 were deployed in the area where the individuals were last seen, searched the area, and
10 discovered a total of four (4) large backpacks of suspected marijuana concealed under
11 desert brush. Compl. (Doc. 1) at 1; *see also* Case No. 17-00185MJ Compl. (Doc. 1).
12 Agents continued to search the surrounding area, and apprehended three (3) individuals
13 approximately two hundred (200) feet away from the marijuana bundles. Compl. (Doc.
14 1) at 1; *see also* Case No. 17-00185MJ Compl. (Doc. 1). These individuals were
15 Defendant Samuel Cervantez-Hernandez, Otoniel Cleofas Escalante-Morales, and Adan
16 De La Fuente-Perez. Compl. (Doc. 1) at 1; *see also* Case No. 17-00185MJ Compl.
17 (Doc. 1). Defendant Cervantez-Hernandez was read his *Miranda*¹ rights in Spanish, as
18 well as interviewed in Spanish. *See* Govt.'s Resp. to Def.'s Mot. to Dismiss (Doc. 42),
19 Cervantez-Hernandez Interview Tr. 8/14/2017 (Exh. "A").

20 ***B. The Complaint and Initial Hearings***

21 Adan De La Fuente-Perez was charged by complaint for conspiracy to possess,
22 with intent to distribute, approximately 80.96 kilograms of marijuana in violation of Title
23 21, United States Code, Section 846. Case No. 17-00185MJ, Complaint (Doc. 1).
24 Defendant Cervantez-Hernandez and Otoniel Cleofas Escalante-Morales were charge via
25 complaint for conspiracy, with intent to distribute, approximately 80.96 kilograms of
26 marijuana, as well as possession of approximately 20.24 kilograms of marijuana in
27 violation of Title 21, United States Code, Sections 846 and 844(a). Compl. (Doc. 1). On
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¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

1 August 15, 2017, all three (3) individuals went before Magistrate Judge Eric J.
2 Markovich for an initial appearance. Minute Entry 8/15/2017 (Doc. 2); Case No. 17-
3 00185MJ Minute Entry 8/15/2017. All were assisted by a Spanish Interpreter, who
4 reported that Defendant Samuel Cervantez-Hernandez may have a language issue.
5 Minute Entry 8/15/2017 (Doc. 2). On August 22, 2017, Defendant Samuel Cervantez-
6 Hernandez was brought before this Court for his Detention Hearing and Preliminary
7 Hearing. Minute Entry 8/22/2017 (Doc. 6). Defense counsel advised the Court that
8 Defendant's primary language is Cora, and he is not a Spanish speaker. *Id.* On
9 September 13, 2017, Defendant Cervantez-Hernandez and Adan De La Fuente-Perez
10 were charged in a two count indictment, including one (1) count of conspiracy to possess
11 with intent to distribute marijuana and one (1) count of possession of marijuana with
12 intent to distribute. Indictment (Doc. 18) at 1–2.

13 ***C. The Evidentiary Hearing***

14 On January 26, 2018, an Evidentiary Hearing was held before Magistrate Judge
15 Bruce G. Macdonald. Minute Entry 1/26/2018 (Doc. 62). The Government did not call
16 any witnesses, and Defendant Cervantez-Hernandez called Dr. Abigail Martinez-Sotelo
17 as its only witness. Dr. Martinez-Sotelo is a Spanish language teacher, and in that
18 capacity assesses individuals' Spanish language ability. Dr. Martinez-Sotelo met with
19 Defendant Cervantez-Hernandez for approximately an hour at the Federal Correctional
20 Institution ("FCI") in Tucson, Arizona.

21 Dr. Martínez-Sotelo testified that it was very difficult for her to communicate with
22 Defendant Cervantez-Hernandez in Spanish, because his Spanish is very limited. Dr.
23 Martínez-Sotelo further opined that in reviewing the video of Defendant Cervantez-
24 Hernandez's interview with Border Patrol, she found Defendant Cervantez-Hernandez
25 did not fully understand the questions asked of him. Dr. Martínez-Sotelo also testified
26 the Defendant Cervantez-Hernandez did not finish elementary school, and that his
27 education occurred in the Cora language, with a small amount of Spanish language in the
28 curriculum. Dr. Martínez-Sotelo acknowledged that Defendant Cervantez-Hernandez

1 was able to answer some questions posed by Border Patrol; however, she also noted that
2 agents often had to repeat questions several times before Defendant Cervantez-Hernandez
3 was able to answer. Dr. Martínez-Sotelo also stated that Defendant Cervantez-Hernandez
4 did not understand the Spanish term for lawyer, although he was able to understand it
5 when she used a simpler word. Dr. Martínez-Sotelo characterized Defendant Cervantez-
6 Hernandez's Spanish language ability as a low novice level, meaning that he could
7 understand some words, but had a limited, basic Spanish vocabulary.

8 9 **II. ANALYSIS**

10 Defendant seeks dismissal of the Indictment, because his primary language is Cora
11 and he speaks insufficient Spanish to adequately communicate with counsel. *See* Def.'s
12 Mot. to Dismiss (Doc. 23). The Government asserts that Defendant speaks sufficient
13 Spanish to continue in this litigation, as evidenced by the transcript of his interview with
14 Border Patrol. Govt.'s Response (Doc. 42) at 4 & Exh. "A." Defendant's attorney,
15 however, asserts that she is unable to have meaningful discussions with her client. Def.'s
16 Mot. to Dismiss (Doc. 23) at 1–2.

17 The Court Interpreters Act of 1978 provides:

18 The presiding judicial officer, with the assistance of the Director of the
19 Administrative Office of the United States Courts, shall utilize the services
20 of the most available certified interpreter, **or when no certified interpreter**
21 **is reasonably available, as determined by the presiding judicial officer,**
22 **the services of an otherwise qualified interpreter,** in judicial proceedings
23 instituted by the United States, if the presiding judicial officer determines
24 on such officer's own motion or on the motion of a party that such party
(including a defendant in a criminal case), or a witness who may present
testimony in such judicial proceedings – (A) speaks only or primarily a
language other than the English language[.]

25 28 U.S.C. § 1827(d)(1) (emphasis added). The Fifth Circuit has recognized that "a
26 district court is given wide discretion in matters regarding the selection of a court
27 interpreter." *United States v. Paz*, 981 F.2d 199, 200 (5th Cir. 1992) (citations omitted);
28 *see also United States v. Sandoval*, 347 F.3d 627, 632 (7th Cir. 2003); *United States v.*

1 *Lopez-Arroyo*, 2015 WL 5601839 n. 4 (citing *Sandoval* with approval). Moreover, such
2 decisions are reviewed under an abuse of discretion standard. *United States v. Paz*, 981
3 F.2d 199, 200 (5th Cir. 1992) (citations omitted); *see also United States v. Sandoval*, 347
4 F.3d 627, 632 (7th Cir. 2003); *United States v. Lopez-Arroyo*, 2015 WL 5601839 n. 4
5 (citing *Sandoval* with approval). The Ninth Circuit reviews factual findings regarding a
6 party's language abilities for clear error. *United States v. Jayavarman*, 871 F.3d 1050,
7 1065 (9th Cir. 2017); *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1994).
8 Under the Court Interpreter's Act the Court must evaluate and make a record regarding
9 the Defendant's language abilities. *See United States v. Murguia-Rodriguez*, 815 F.3d
10 566, 570 (9th Cir. 2016); *United States v. Si*, 333 F.3d 1041, 1043–44. A Defendant has
11 a constitutional and statutory right to an interpreter, if he needs one. *See Si*, 333 F.3d at
12 1044–45.

13 The Court finds Dr. Martínez-Sotelo testimony credible. Based on Dr. Martínez-
14 Sotelo's opinion, as well as defense counsel's averment that she is unable to sufficiently
15 communicate with Defendant Cervantez-Hernandez to fulfill her responsibilities as his
16 attorney, the Court finds that Defendant Cervantez-Hernandez is unable to proceed in the
17 Spanish language. To date, the Court has been unable to locate a certified Cora
18 interpreter. Furthermore, the Court's own efforts to make contact with either of the two
19 (2) possible Cora interpreters the Government referenced in its motion have been
20 unavailing. Accordingly, the Court recommends granting Defendant Cervantez-
21 Hernandez's motion to dismiss.

22 23 **III. CONCLUSION**


24 The Court finds that Defendant Cervantez-Hernandez lacks sufficient Spanish
25 language capabilities to assist in his defense without a Cora interpreter. Because no such
26 interpreter is available, this case should be dismissed.

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For the foregoing reasons, the Magistrate Judge recommends that the District Judge GRANT Defendant Samuel Cervantez-Hernandez's Motion to Dismiss (Doc. 23).

Failure to file timely objections to any factual or legal determination of the Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right of review.


Honorable Bruce G. Macdonald
United States Magistrate Judge